81896-7

No.

SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 60075-3-I

ANNE and CHRIS McCURRY, on behalf of themselves and others similarly situated,

Petitioners,

v.

CHEVY CHASE BANK, F.S.B.,

Respondent.

PETITION FOR REVIEW

WILLIAMSON & WILLIAMS
Rob Williamson, WSBA #11387
187 Parfitt Way SW
Bainbridge Island, WA 98110
Tel: (206) 780-4447

BECKETT LAW OFFICES, PLLC
Guy W. Beckett, WSBA #14939
1708 Bellevue Ave.
Seattle, WA 98122
Tel: (206) 264-8135

KELLER ROHRBACK, L.L.P.
Mark A. Griffin, WSBA #16296
1201 Third Ave., Ste. 3200
Seattle, WA 98101-3052
Tel: (206) 623-1900

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, REGULATIONS AND COURT RULES

OTHER AUTHORITY

I. IDENTITY OF PETITIONER

Petitioners Anne and Chris McCurry ("the McCurrys") request this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this Petition.

II. COURT OF APPEALS DECISION

The Court of Appeals decision was filed on June 2, 2008 and reported at ___ Wn. App. ___, ___ P.3d ___, 2008 WL 2231460 (2008). *See* Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals decision that the McCurrys' breach of contract claim is preempted conflicts with decisions of the United States Supreme Court that require state courts to enforce private contracts voluntarily undertaken by business entities subject to federal regulation?

2. Whether the Court of Appeals decision that the McCurrys' Washington Consumer Protection Act ("WCPA") claim is preempted conflicts with the strong state interest in regulating deceptive conduct by business entities?

3. Whether the Court of Appeals decision dismissing the McCurrys' claim to recover a notary fee they paid that Chevy Chase may not have incurred merely because their Complaint did not allege that Chevy Chase had not had anything notarized violates the directive of Civil Rule 8(a) that a party's Complaint only need contain "a short and plain statement of the claim showing that the pleader is entitled to relief," and numerous Supreme Court decisions applying CR 8(a) and CR 12(b)(6)?

IV. STATEMENT OF THE CASE

A. Background facts.

In February 2003, the McCurrys obtained a loan from Chevy Chase and signed a Deed of Trust in favor of Chevy Chase to secure it. Clerk's Papers ("CP") 4. Chevy Chase is a federally chartered savings bank. CP 104.

The McCurrys' Deed of Trust defined "Loan" as

> [T]he debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

CP 13. The Deed of Trust defined "Lender" as "Chevy Chase," and "Security Instrument" as "this document," (*id.*) and, in Paragraph 23, stated upon what conditions the Deed of Trust would be reconveyed:

> **Reconveyance.** *Upon payment of all sums secured by this Security Instrument*, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs and the Trustee's fee for preparing the reconveyance.

CP 24 (emphasis supplied). The Deed of Trust secured Chevy Chase's loan, interest due on the loan, and other charges specified in the Note and Deed of Trust. CP 14. The Deed of Trust did not state that Chevy Chase

could charge the McCurrys "Accumulated Fax Fees" or a "Notary Fee" when they paid off their loan, and did not state that such fees were secured by the Deed of Trust. CP 12-31. Nor did the Deed of Trust state that the McCurrys would be required to pay such fees when they paid off their loan in order to obtain the release of Chevy Chase's security interest in their real property. *Id.*

The McCurrys sought to pay off their loan prior to its due date, in November 2004. CP 4-5, 33. Their escrow agent requested a loan payoff amount from Chevy Chase. *Id.* In the payoff statement it delivered to the escrow agent which specified the amount the McCurrys needed to pay in order to pay off their loan and obtain a reconveyance of the Deed of Trust, Chevy Chase required the McCurrys to pay, as part of the "Total Amount Due Chevy Chase," $20 in "Accumulated Fax Fees" and a $2 "Notary Fee." CP 33. The Payoff Statement warned, "Payoffs cannot be processed unless the 'Total Amount Due Chevy Chase', shown above, is remitted." *Id.* The McCurrys paid the required "Accumulated Fax Fees" and "Notary Fee" to obtain the reconveyance of their Deed of Trust. CP 5.

B. Trial court's dismissal of the McCurrys' claims.

The McCurrys filed their Complaint against Chevy Chase in April 2006. CP 3. Their Deed of Trust specifically stated what sums it secured, and Accumulated Fax Fees and a Notary Fee were not included. CP 5, 12-

13, 24. The McCurrys alleged that by requiring them to pay these fees as a condition of obtaining the reconveyance of the Deed of Trust, Chevy Chase breached its contract with them and was unjustly enriched. CP 4-8. The McCurrys also alleged, relying on *Dwyer v. J.I. Kislak Mortgage Corp.,* 103 Wn. App. 542, 13 P.2d 240 (2000), that Chevy Chase's inclusion of the fax and notary fees in its Payoff Statement that needed to be paid for them to obtain the reconveyance of the Deed of Trust was deceptive and violated the WCPA, RCW Chapter 19.86. CP 8-9. The McCurrys, on their own behalf and on behalf of a putative class of Chevy Chase borrowers, sought declaratory relief, to recover damages and restitution, and for an injunction to prevent Chevy Chase from deceptively charging such fees in the future. CP 8-10.

In response to the McCurrys' Complaint, Chevy Chase filed its CR 12(b)(6) motion to dismiss. CP 40-68. Chevy Chase argued, *inter alia,* that the fax and notary fees it charged were "loan-related fees," and that the McCurrys' claims were therefore preempted by the Home Owners' Loan Act ("HOLA"), 12 U.S.C. § 1462, et seq., and by 12 C.F.R. § 560.2, a regulation implemented pursuant to HOLA by the Office of Thrift Supervision ("OTS"). CP 51-59. In its motion and the evidence it submitted in support of it, Chevy Chase did not explain what the $2 "Notary Fee" was that it charged the McCurrys, or whether Chevy Chase

even actually incurred or paid a "Notary Fee" in connection with the payoff of the McCurrys' loan.

In their opposition to the motion, the McCurrys argued that the fax and notary fees were not "loan-related fees" under 12 C.F.R. § 560.2, but even if they were, Chevy Chase contracted with them not to charge unsecured fees (like fax and notary fees) as a condition of reconveying their Deed of Trust, and Chevy Chase is bound by its contract. CP 148-153. The McCurrys pointed out that there was no evidence explaining the basis for the imposition of the Notary Fee, or whether Chevy Chase actually incurred or paid the Fee. CP 151.[1] The McCurrys also argued that their claims were not preempted because 12 C.F.R. § 560.2 specifically provides that state laws of general application pertaining to, *inter alia,* contract, commercial, and tort law are not preempted if they only incidentally affect a federal savings bank's lending operations, and state laws governing breach of contract, unjust enrichment, and the WCPA are within laws not preempted. CP 151-54. Finally, the McCurrys argued that their claims were not preempted because their Deed of Trust provided that it was to be governed both by federal law and Washington law. CP 148.

[1] In its reply in support of its motion to dismiss, Chevy Chase speculated that the fee was for "[n]otarizing a release of lien for recording," but provided no evidentiary support for this speculative assertion. CP 204

On May 11, 2007, King County Superior Court Judge Richard Eadie ruled that the McCurrys' claims were preempted by HOLA and dismissed their Complaint.[2] CP 259-60; Report of Proceedings ("RP") 54-56.

C. Court of Appeals decision.

The McCurrys appealed the trial court's dismissal of their Complaint. CP 261-65. On June 2, 2008, the Court of Appeals filed its opinion and affirmed the trial court. *See* Appendix A. The Court concluded that "Accumulated Fax Fees" and the "Notary Fee" were "loan-related fees," thus the McCurrys' claims are preempted by 12 C.F.R. §560.2. *Id.* at 3-12. Although Chevy Chase submitted no evidence concerning what effect its ability to collect the fees at issue would have on its lending operations, the Court of Appeals decided that "a judicial decision imposing restrictions on the type of fees at issue ... would more than 'incidentally affect' Chevy Chase's lending operations." The Court concluded that even though the McCurrys' contract with Chevy Chase provided that it would be governed by both federal and state law, the

---

[2] Judge Eadie seemingly also agreed that Chevy Chase was exempted from the McCurrys' WCPA claim pursuant to RCW 19.86.170, but his oral ruling is ambiguous, and the written order dismissing the Complaint does not elaborate on the reasons for the dismissal. RP 55-56; CP 259-260. The Court of Appeals affirmed the dismissal of the McCurrys' claims based on federal preemption and did not address this aspect of the trial court decision. *See* Appendix A.

parties could not "displace a superseding federal regulation." *Id.* at 9-10. Finally, concerning the basis for the imposition of the Notary Fee and whether Chevy Chase actually incurred such a charge, the Court of Appeals ruled that because the McCurrys did not specifically allege in their Complaint that Chevy Chase did not have anything notarized, whether Chevy Chase incurred such a charge "provides no basis to reverse the complaint's dismissal." *Id.* at 3, n.1. The Court of Appeals decision left the McCurrys without any remedy for Chevy Chase's breach of contract, violations of the WCPA, and unjust enrichment.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court of Appeals decision that the McCurrys' breach of contract claim is preempted conflicts with decisions of the United States Supreme Court that require state courts to enforce private contracts voluntarily undertaken by persons subject to federal regulation.

The U.S. Supreme Court has held that federal statutes and regulations do not preempt contract obligations voluntarily assumed by business entities. These cases make it clear that the McCurrys' breach of contract claims are not preempted by federal law, contrary to the Court of Appeals decision.

In *American Airlines, Inc. v. Wolens,* 513 U.S. 219, 115 S.Ct. 817 (1995), the Supreme Court considered the preemption clause in the Airline Deregulation Act of 1978 ("ADA"), which prohibited states from

"enact[ing] or enforc[ing] any law ... relating to [air carrier] rates, routes, or services of any carrier," and whether it barred consumers' breach of contract lawsuit challenging an airline's retroactive changes in the terms and conditions of its frequent flyer program. The Court ruled that while the ADA's preemption provision "stops States from imposing their own substantive standards with respect to rates, routes, or services," it does not stop them "from affording relief to a party who claims and proves that an airline dishonored a [contract] term the airline itself stipulated." *Wolens,* 513 U.S. at 232-33. Thus, parties to contracts with airlines may enforce those contracts in state courts, "with no enlargement or enhancement based on state laws or policies external to the agreement." *Id.* at 233. The Court explained:

> We do not read the ADA's preemption clause, however, to shelter airlines from suits ... seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings. ... A remedy confined to a contract's terms simply holds parties to their agreements – in this instance, to business judgments an airline made public about its rates and services.

513 U.S. at 228-29.

Similarly, in *Volt Information Sciences, Inc. v. Board of Trustees,* 489 U.S. 468 (1989), the U.S. Supreme Court concluded, based on a choice-of-law clause in a construction contract, that the parties intended to arbitrate their disputes in accordance with California's rules of arbitration.

The Court held that those rules were not preempted by the Federal Arbitration Act ("FAA"). In the Supreme Court's view, the FAA did not preclude the application of California's arbitration rules in accordance with the terms of the parties' own contract:

> Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA .... By permitting the courts to "rigorously enforce" such agreements according to their terms, ... we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA.

489 U.S. at 479 (citation omitted).

Likewise, in *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 112 S.Ct. 2608 (1992), the U.S. Supreme Court ruled that a consumer's state law damages claim based on a cigarette manufacturer's breach of express warranty was not preempted under the Federal Cigarette Labeling and Advertising Act, as amended by the 1969 Public Health Cigarette Smoking Act. As amended, Section 5(b) of the Act specified, "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are [lawfully] labeled." A deceased smoker's estate sued a cigarette manufacturer for, *inter alia,* breaching its express warranty that smoking its cigarettes "did not present any significant health

consequences." *Cipollone,* 505 U.S. at 510. The manufacturer argued that Section 5(b) of the Act preempted this claim because it challenged the propriety of its advertising and promotion.

The Supreme Court disagreed, ruling that the estate's express warranty claim was not preempted. Justice Stevens' explanation for this decision is directly on point here and compels the conclusion that the McCurrys' breach of contract claim should not be preempted:

> A manufacturer's liability for breach of an express warranty derives from, and is measured by, the terms of that warranty. Accordingly, the "requirement[s]" imposed by an express warranty are not "imposed under State law," but rather imposed by the *warrantor*. If , for example, a manufacturer expressly promised to pay a smoker's medical bills if she contracted emphysema, the duty to honor that promise could not fairly be said to be "imposed under state law," but rather is best understood as undertaken by the manufacturer itself. While the general duty not to breach warranties arises under state law, the particular "requirement ... based on smoking and health ... with respect to the advertising or promotion [of] cigarettes in an express warranty claim arises from the manufacturer's statements in its advertisements. In short, a common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a "requirement ... *imposed under State law"* within the meaning of § 5(b).

Id. at 525-26 (emphasis in original, footnotes omitted). Justice Stevens addressed and rejected the very argument embraced by the Court of Appeals in this case, that the plaintiffs' effort to hold the defendant to its contract obligations constituted an effort to impose on the defendant

requirements imposed under state law and thus should be preempted:

> Justice SCALIA contends that because the general duty to honor express warranties arises under state law, every express warranty obligation is a "requirement ... imposed under State law," and that, therefore, the Act pre-empts petitioner's express warranty claim. Justice SCALIA might be correct if the Act pre-empted "*liability*" imposed under state law ...; but instead the Act expressly pre-empts only a "*requirement or prohibition*" imposed under state law. That a "contract has no legal force apart from the [state] law that acknowledges its binding character does not mean that every contractual provision is "imposed under State law." To the contrary, common understanding dictates that a contractual requirement, although only enforceable under state law, is not "imposed" by the State, but rather is "imposed" by the contracting party upon itself.

Id. at 526, n.24 (emendation and emphasis in original, citation omitted).[3]

Here, Chevy Chase voluntarily agreed that the McCurrys' mortgage loan would be governed by the terms of the Deed of Trust. Under the Deed of Trust, Chevy Chase voluntarily obligated itself to

---

[3] *Accord, Gibson v. World Sav. And Loan Ass'n,* 103 Cal. App.4th 1291, 1306, 128 Cal. Rptr.2d 19 (Cal. App. 4 Dist. 2003) ("While state law cannot prescribe limits on the [hazard insurance] premiums to be charged [by federal savings banks subject to OTS regulation], the parties can agree to contractual terms that place certain restrictions on those premiums[, a]nd ... the courts of this state can interpret and enforce those contractual limitations without impinging upon the preempted field of regulation."); *Reyes v. Downey Savings and Loan Association,* 541 F. Supp.2d 1108, 1114 (C.D. Cal. 2008) ("Just as a law against battery will not be preempted merely because the batterer works for a federal savings loan, so a law against breach of contract will not be preempted just because the contract relates to loan activity."); *In re: Ocwen Loan Servicing, LLC Mortgage Servicing Litigation,* 491 F.3d 638, 643 (7th Cir. 2007) ("Suppose an S & L signs a mortgage agreement with a homeowner that specifies an annual interest rate of 6 percent and a year later bills the homeowner at a rate of 10 percent and when the homeowner refuses to pay institutes foreclosure proceedings. It would be surprising for a federal regulation to forbid the homeowner's state to give the homeowner a defense based on the mortgagee's breach of contract.... Enforcement of state law ... would complement rather than substitute for the federal regulatory scheme.").

refrain from charging any unsecured fees as a precondition for reconveying the property free from the Deed of Trust lien. Chevy Chase breached that duty when it demanded that the McCurrys pay fax and notary fees in order to obtain the discharge of their mortgage. Based on the Supreme Court's decisions in *Wolens, Cipollone,* and *Volt*, HOLA clearly does not preempt state laws that simply require Chevy Chase to comply with its voluntarily-assumed contract obligations, and does not preempt their breach of contract claim for its failure to do so.

Another reason inherent in the McCurrys' Deed of Trust contract with Chevy Chase that compels a decision that their breach of contract claims are not preempted is the provision in their agreement that it is to be "governed by federal law **and** the law of the jurisdiction where the Property is located." CP 22 (emphasis supplied). "The law of the jurisdiction where the Property is located" requires application of Washington law on contracts to disputes between the McCurrys and Chevy Chase; therefore, the McCurrys' state law remedies for breach of contract (as well as for Chevy Chase's unjust enrichment and violations of the WCPA) are not preempted.

The Court of Appeals gave short shrift to this argument supporting reversal, citing a decision of the Maryland Court of Appeals, *Chaires v. Chevy Chase Bank, F.S.B.,* 748 A.2d 34 (Md. App. 2000) for the

proposition that a choice of law provision in a deed of trust selecting state law cannot "displace a superseding federal regulation." *See* Appendix A at 9-10. However, *Chaires* was decided *prior* to the Maryland Supreme Court's decision in *Wells v. Chevy Chase Bank, F.S.B.,* 832 A.2d 812 (Md. 2003), *cert. denied,* 541 U.S. 983 (2004), in which that court rejected Chevy Chase's argument that federal preemption under HOLA displaced a plaintiff's claims based on notice provisions under Maryland law, where the Bank's credit cardholder agreement with the plaintiff stated that it was "governed" by "Subtitle 9 of Title 12 of the Commercial Law Article of the Maryland Annotated Code and applicable federal laws"; the inclusion of this provision meant that the Bank had incorporated state law notice provisions in its agreement. *Id.* at 832-33. Thus, the Maryland Court of Appeals' ruling in *Chaires* that HOLA preempts the application of state law in contracts with federal savings banks where the contract provides that state law applies has been implicitly overruled, and the Court of Appeals' citation to and reliance on it in this case was misplaced.[4]

Accordingly, because the Court of Appeals decision in this case conflicts with several U.S. Supreme Court decisions holding that contract

---

[4] *Accord, College Loan Corp. v. SLM Corp.,* 396 F.3d 588, 598-99 (8th Cir. 2005) (where parties incorporated obligations imposed by the Higher Education Act in their contract, state law claim for breach of contract action based on violation of standards imposed by Act was not preempted, notwithstanding comprehensive federal regulations promulgated pursuant to and under the Act).

obligations voluntarily assumed by business entities are enforceable under state law and are not preempted, and because there was an express contract provision calling for the application of state law to disputes under the McCurrys' contract with Chevy Chase, Supreme Court review of the Court of Appeals decision is warranted under RAP 13.4(b)(4).

B. The Court of Appeals decision that the McCurrys' WCPA claim is preempted conflicts with the strong state interest in regulating deceptive conduct by business entities.

By holding that the McCurrys' WCPA claim is preempted, the Court of Appeals disregarded the strong state interest in regulating deceptive conduct by lenders like Chevy Chase. The purpose of the WCPA is "to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition." RCW 19.86.920.[5] Indeed, the very conduct in which Chevy Chase engaged – misrepresenting in its Payoff Statement the amount a consumer must pay in order to obtain the reconveyance of a Deed of Trust securing a loan – was held to be deceptive and a violation of the WCPA in

[5] In two recent decisions, the Supreme Court acknowledged the strong public policy inherent in the WCPA's private right of action as a method to protect citizens from deceptive business practices. *See Dix v. ICT Group, Inc.,* 160 Wn.2d 826, 837, 161 P.3d 1016 (2007) (forum selection clause that impairs consumer's ability to bring suit to enforce the WCPA "violates the public policy of this state"); *Scott v. Cingular Wireless,* 160 Wn.2d 843, 861, 161 P.3d 1000 (2007) ("The ... CPA ... unquestionably embodies the legislative statement of strong public policy favoring private actions to enforce the act[.]"

Dwyer, 103 Wn. App. at 547-48.

Laws concerning consumer protection are included within the state's police power and thus subject to a heightened presumption against preemption. *Washington Mutual v. Superior Court,* 95 Cal. App. 606, 613, 115 Cal. Rptr.2d 765 (Cal. App. 2 Dist. 2002).[6]

12 C.F.R. § 560.2(c) specifies that state laws that only incidentally affect lending operations of federal savings banks in the areas of, *inter alia,* contract and commercial law, tort law, and "any other law that ... [f]urthers a vital state interest," are not preempted. Many courts across the United States have therefore held and opined that state consumer protection laws like the WCPA are not preempted under HOLA and may be applied to a federal savings association's conduct.[7]

---

[6] *See also Gibson,* 103 Cal. App.4th at 1300 (because "the state's historic police powers include the regulation of consumer protection," there was a "strong presumption against" preemption pursuant to [§ 560.2 of the OTS regulations under] HOLA").

[7] *See, e.g., Gibson,* 103 Cal. App. at 1307 (plaintiff's claim that federal savings bank's practice of charging borrowers cost of hazard insurance violated California's Unfair Practices Act not preempted by HOLA); *Sepulveda v. Highland Federal Savings and Loan,* 14 Cal. App.4th 1692, 19 Cal. Rptr.2d 555 (Cal. App. 2 Dist. 1993), *cert. denied sub nom Highland Fed. Loan v. California,* 510 U.S. 928, 114 S.Ct. 338 (1993) (plaintiff's claims under California Unfair Business Practices Act arising from lender's involvement in financing slum properties not preempted by HOLA); *Fenning v. Glenfed, Inc.,* 40 Cal. App.4th 1285, 47 Cal. Rptr.2d 715 (Cal. App. 2 Dist. 1996) (HOLA did not preempt plaintiff's consumer protection claims arising from lender's misrepresentation that financial instruments it sold were FDIC insured); *McKell v. Washington Mutual,* 142 Cal. App.4th 1457, 1487, 49 Cal. Rptr.3d 227 (Cal. App. 2 Dist. 2006) (HOLA did not preempt mortgagors' consumer protection claims in connection with federal savings bank's excessive fees for underwriting, tax services, and wire transfers for home loan closings; "[T]he state cannot dictate to the Bank how it can or cannot operate, but it can insist that, however the Bank chooses to operate, it do so free from fraud and other deceptive business practices."); *In re: Ocwen Loan Servicing, LLC Mortgage Servicing*

The OTS' Chief Counsel's December 24, 1996 opinion (available at 1996 WL 767462) is consistent with these decisions and confirms that the OTS itself does not consider state consumer protection act claims like the one asserted in this case preempted by HOLA:

> State laws prohibiting deceptive acts and practices in the course of commerce are not included in the illustrative list of preempted laws in § 560.2(b).... The OTS has indicated, however, that it does not intend to preempt state laws that establish the basic norms that undergird commercial transactions.... The Indiana [Deceptive Acts and Practices statute ("DAP")] falls within the category of traditional "contract and commercial" law under § 560.2(c)(1). While the DAP may affect lending relationships, the impact on lending appears to be only incidental to the primary purpose of the statute-the regulation of the ethical practices of all businesses engaged in commerce in Indiana.

Because the WCPA is a law of general application and not specifically intended to regulate banks' and lenders' conduct, the savings provision of 12 C.F.R. § 560.2(c) directs that the McCurrys' WCPA claims against

---

Litigation, 491 F.2d at 643-44 (plaintiffs' consumer protection claims that federal savings banks had charged excessive service charges in connection with mortgage foreclosures not preempted by HOLA); *Courtney v. Halleran,* 485 F.3d 942, 951 (7th Cir. 2007) (depositors' consumer fraud claims against federal savings bank's owners, officers, directors, and accountants not preempted under HOLA; "[S]tate banking laws are not preempted if they 'do[ ] not prevent or significantly interfere with the national bank's exercise of its powers.' .... If state banking laws are not preempted, there is even less reason to think that federal banking laws preempt state laws of general applicability like the Illinois Consumer Fraud Act[.]"); *Binetti v. Washington Mutual Bank,* 446 F. Supp.2d 217 (S.D.N.Y 2006) (HOLA did not preempt borrower's claim under New York Consumer Fraud Statute that federal savings bank had assessed impermissible interest charges after loans were paid off); *Reyes v. Downey,* 541 F. Supp.2d at 114-15 (HOLA did not preempt mortgagor's claim under California Unfair Competition Law that mortgagee promised a lower loan rate than was delivered, misrepresented loan terms, and breached loan contract).

Chevy Chase are not preempted by HOLA and 12 C.F.R. §560.2.

The Court of Appeals also concluded that "a judicial decision imposing restrictions on the type of fees at issue in this case would more than 'incidentally affect' the lending operations of federally chartered savings banks" and would therefore be preempted under 12 C.F.R. §560.2(c). This decision is contrary to the conclusion expressed in the Opinion of the OTS Chief Counsel discussed above, and is also contrary to decisions of courts in several other states.[8] Moreover, as this was a CR 12(b)(6) motion, there was no evidence submitted by either party as to what effect application of a prohibition on Chevy Chase's deceptive business practices would have on its lending operations. The McCurrys should have been given the opportunity to conduct discovery and present evidence on the matter. Accordingly, Supreme Court review of the Court of Appeals decision is warranted under RAP 13.4(b)(4).

---

[8] *See Courtney v. Halloran,* 485 F.3d at 951; *Lopez v. World Sav. and Loan Ass'n,* 105 Cal. App.4th 729, 130 Cal. Rptr.2d 42 (Ct. App. 1 Dist. 2003) (citation omitted) ("Any effect [the duties of a contracting bank not to misrepresent material facts and to refrain from unfair or deceptive business practices] they have on the lending activities of a federal savings association is incidental rather than material."); *Binetti v. Washington Mutual Bank,* 446 F. Supp.2d 217, 220 (S.D.N.Y. 2006) ("[T]he New York Consumer Fraud Statute ... is not directly aimed at lenders, and has only an incidental impact on lending relationships."). *Accord, Koynenbelt v. Flagstar Bank, FSB,* 617 N.W.2d 706, 713, 242 Mich. App. 21 (2000) (affirming trial court decision that restriction on federal bank's ability to charge to record mortgage satisfaction despite contract prohibiting it from doing so only incidentally affected bank's lending operations).

C. The fact that the McCurrys' Complaint did not allege that Chevy Chase may not have had anything notarized is no bar to their claim that Chevy Chase should not have charged them a notary fee as a precondition to the release of their Deed of Trust, and the Court of Appeals' holding that it is conflicts with CR 8(a) and numerous Supreme Court decisions interpreting it and CR 12(b)(6).

In their Complaint, the McCurrys alleged that Chevy Chase charged them, and they paid, a $2 Notary Fee "not authorized" and not "permitted nor secured by" their Deed of Trust. CP 4-5. The McCurrys alleged that the requirement that they pay this Fee was a breach of contract and that Chevy Chase required them to pay it in order to "obtain a release of their mortgage or for their deed[ ] of trust to be reconveyed to them." CP 8.

In its motion to dismiss, Chevy Chase argued that the Notary Fee paid by the McCurrys was a "loan-related fee" but presented no evidence showing that its imposition had anything to do with the McCurrys' loan, that Chevy Chase paid such a fee, or why Chevy Chase considered it to be a "loan-related fee."

On appeal, the McCurrys argued that applying CR 12(b)(6) standards, it was a conceivable set of hypothetical facts that Chevy Chase in fact did not incur and did not pay any "Notary Fee" related to the McCurrys' loan payoff and deed of trust reconveyance. If these facts were in fact true, there would have been no basis for Chevy Chase to charge the

McCurrys this fee, and no basis for it to call the fee "loan-related." The Court of Appeals summarily rejected this suggested basis for reversal, stating tersely, "[T]he McCurrys did not include such an allegation [that Chevy Chase may not have actually had anything notarized], so it provides no basis to reverse the complaint's dismissal." *See* Appendix A at 3, n.1. This holding conflicts with CR 8(a) and 12(b)(6), and Supreme Court decisions interpreting and applying those rules.

CR 8(a) only requires a plaintiff to state in his Complaint (a) a short and plain statement of the claim showing that he is entitled to relief, and (b) a demand for judgment for the relief to which he deems himself entitled. "Under these 'liberal rules of procedure,' a complaint is sufficient so long as it provides notice of the general nature of the claim asserted.'" *Pacific Northwest Shooting Park Ass'n v. City of Sequim,* 158 Wn.2d 342, 358-59, 144 P.3d 276 (2006) (citation omitted). A Complaint meets this standard if it gives the opposing party "fair notice" of the claims. *Id.* at 352 (citation omitted). It is not necessary for a plaintiff to plead facts constituting a cause of action. *Id.* at 359 (citation omitted).

The trial court should deny a CR 12(b)(6) motion to dismiss for failure to state a claim if there is any set of hypothetical facts that the plaintiff may be able to prove consistent with his complaint that would entitle him to relief. *Halvorson v. Dahl,* 89 Wn.2d 673, 674, 574 P.2d

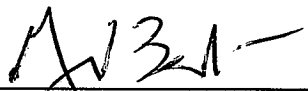
1190 (1978); *Bravo v. Dolsen Companies,* 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

The hypothetical fact that Chevy Chase did not incur or pay a Notary Fee related to the payoff of the McCurrys' loan (and that the Fee therefore could not be a "loan-related fee") was a hypothetical fact consistent with the allegations asserted in the McCurrys' Complaint that would have entitled them to obtain the relief they requested in it, i.e., reimbursement and restitution of the Fee. Had this hypothetical fact been proven as true, then there would be no basis for federal preemption of their claims. In order to recover on their claims, the McCurrys were not required to specifically allege in their Complaint that Chevy Chase did not "actually [have] anything notarized." *See* Appendix A at 3, n. 1. The Court of Appeals' holding that they were so required was in conflict with CR 8(a) and 12(b)(6) and the Supreme Court cases cited in the preceding two paragraphs of this Petition. Therefore, Supreme Court review of the Court of Appeals decision is warranted under RAP 13.4(b)(1) and (b)(4).

VI. CONCLUSION

For these reasons, the Supreme Court should accept review.

RESPECTFULLY SUBMITTED THIS 2nd day of July, 2008.



Guy W. Beckett, WSBA #14939
Co-counsel for Petitioners

APPENDIX: A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ANNE and CHRIS MCCURRY, on behalf of themselves and others similarly situated, Appellants, v. CHEVY CHASE BANK, F.S.B., Respondent.	DIVISION ONE No. 60075-3-I PUBLISHED OPINION FILED: June 2, 2008

DWYER, J. — In this case we are asked to decide whether federal regulations preempt certain state law claims made against a home loan lender. Anne and Chris McCurry appeal the trial court's dismissal of their putative nationwide class action against federally chartered savings bank Chevy Chase Bank, F.S.B. Chevy Chase charged the McCurrys $20 in "Accumulated Fax Fees" and a $2 "Notary Fee" as a result of the McCurrys' payoff of a home loan made to them by Chevy Chase. In a "Payoff Statement" issued to the McCurrys, Chevy Chase stated that the McCurrys' "[p]ayoffs cannot be processed unless the 'Total Amount Due Chevy Chase' [including the fax and notary fees] is remitted."

The McCurrys' complaint alleges that these fees breached Chevy Chase's contract with the McCurrys (i.e., the deed of trust securing their loan), unjustly enriched Chevy Chase, and violated Washington's Consumer Protection Act (CPA), chapter 19.86 RCW. The trial court ruled that these allegations fail to state a claim upon which relief could be granted because regulations issued by the federal Office of Thrift Supervision (OTS), pursuant to its authority under the federal Home Owners' Loan Act (HOLA), 12 U.S.C. §§ 1461-70, occupy "the entire field of lending regulation for federal savings associations," and expressly preempt state statutes and judicial decisions that purport to regulate "loan-related fees." 12 C.F.R. § 560.2. Because we agree with the trial court that the fees about which the McCurrys complain are not subject to additional regulation arising out of Washington state court adjudication of state statutory or common law claims, we affirm.

CR 12(b)(6) Standard

A preliminary issue is whether, in reviewing the trial court's dismissal of the McCurrys' complaint, we should adopt the standard for dismissal now utilized by the federal courts in resolving motions brought pursuant to Federal Rule of Civil Procedure 12(b)(6). See Bell Atl. Corp. v. Twombly, __ U.S. __, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d. 929 (2007). Chevy Chase urges us to apply the Twombly standard, noting that it requires that allegations be "plausible" in order to survive a motion for dismissal. Twombly, 127 S. Ct. at 1965-66.

We interpret "court rules as if they were statutes." Farmers Ins. Exch. v. Dietz, 121 Wn. App. 97, 100, 87 P.3d 769 (2004). Thus, once the state Supreme Court decides an issue with respect to a state court rule, that interpretation is

binding on all lower courts until it is overruled by the state Supreme Court. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Accordingly, we are without authority to adopt a standard for claim dismissal different from the one previously announced by our Supreme Court.

This being the case, "a challenge to the legal sufficiency of the plaintiff's allegations must be denied unless no state of facts which plaintiff could prove, consistent with the complaint, would entitle the plaintiff to relief on the claim." Halvorson v. Dahl, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978).[1]

Preemption

The central issue before us is whether the express preemption regulations issued by OTS bar the state law claims asserted by the McCurrys. The McCurrys contend that their claims against Chevy Chase are not preempted by 12 C.F.R. § 560.2 because, first, the fax and notary fees charged by Chevy Chase are not "loan-related fees," and, second, their claims pertaining to these fees, if found to be viable under Washington law, would have "only incidentally affect[ed] the lending operations" of federally chartered savings banks such as Chevy Chase. See 12 C.F.R. § 560.2(b)(5) and (c). Chevy Chase responds that the fax fees and notary fees charged in its payoff statement are precisely the type of "loan-related fees" described in 12 C.F.R. § 560.2(b)(5) and are, accordingly, immune from state regulation either directly by statute or indirectly by judicial application of state law. Chevy Chase is correct.

[1] The McCurrys contend that a conceivable fact, requiring reversal, is that Chevy Chase may not have actually had anything notarized. But the McCurrys did not include such an allegation in their complaint, and so it provides no basis to reverse the complaint's dismissal.

"The Supremacy Clause of the United States Constitution provides the basis for federal preemption of state laws." Boursiquot v. Citibank F.S.B., 323 F. Supp. 2d 350, 354 (D. Conn. 2004) (citing Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982)). Enacted in 1933 to provide emergency relief from a crisis of home loan defaults during the Great Depression, HOLA "empowered what is now the Office of Thrift Supervision in the Treasury Department to authorize the creation of federal savings and loan associations, to regulate them, and by its regulations to preempt conflicting state law." In re Ocwen Loan Servicing, LLC, Mortg. Servicing Litig., 491 F.3d 638, 641-42 (7th Cir. 2007) (citing de la Cuesta, 458 U.S. at 161-62). Based on this authority conferred by Congress, "OTS promulgated 12 C.F.R. § 560.2(a) with the specific intention of occupying 'the entire field of lending regulation for federal savings associations.'" Boursiquot, 323 F. Supp. 2d at 355 (quoting 12 C.F.R. § 560.2(a)).[2]

The OTS regulations are explicit that federal law leaves no room for direct state regulation of the loan-related activities of federally chartered savings associations, including regulation through judicial decisions of state law claims:

> (a) *Occupation of field.* . . . OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities, except to the extent provided in

[2] "'For purposes of determining Congressional intent, federal regulations enacted under authority granted by Congress are entitled to the same preemptive effect as a federal statute.'" Lopez v. World Sav. & Loan Ass'n, 105 Cal. App. 4th 729, 736, 130 Cal. Rptr. 2d 42 (2003) (quoting Wis. League of Fin. Insts. v. Galecki, 707 F. Supp. 401, 404 (W.D. Wis. 1989)).

> paragraph (c) of this section or §560.110 of this part. For purposes of this section, "state law" includes any state statute, regulation, ruling, order or judicial decision.

12 C.F.R. § 560.2(a).

The OTS preemption regulations then provide a non-exclusive, illustrative list of the types of state regulatory behaviors, categorized by the object of regulation, that are expressly barred by the application of federal law. In addition to listing nearly every conceivable state licensing or other requirement that might be imposed on the savings associations themselves, as well as state regulations purporting to mediate the terms of credit as between the lender and borrower, the OTS regulations explicitly list as preempted those state regulatory actions that attempt to define the lawfulness of various fees imposed by savings associations on their customers:

> (b) *Illustrative examples.* . . . [T]he types of state laws preempted by paragraph (a) of this section include, without limitation, state laws purporting to impose requirements regarding:
>
> . . . .
>
> (5) Loan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees.

12 C.F.R. § 560.2(b).

Finally, the OTS regulations provide that generally applicable state laws are not preempted, provided that they do not directly affect the lending operations of federally chartered savings associations:

> (c) *State laws that are not preempted.* State laws of the following types are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section:

(1) Contract and commercial law;

(2) Real property law;

(3) Homestead laws specified in 12 U.S.C. 1462a(f);

(4) Tort law;

(5) Criminal law; and

(6) Any other law that OTS, upon review, finds:

(i) Furthers a vital state interest; and

(ii) Either has only an incidental effect on lending operations or is not otherwise contrary to the purposes expressed in paragraph (a) of this section.

12 C.F.R. § 560.2(c). "Thus, § 560.2 would preempt any state statute or judicial decision purporting to regulate loan-related fees or the processing and servicing of mortgages, or any state statute or judicial decision that has more than an incidental effect on the lending operations of federal savings associations." Haehl v. Wash. Mut. Bank, F.A., 277 F. Supp. 2d 933, 940 (S.D. Ind. 2003).

Intrinsic to this preemption framework, then, is that federally chartered savings associations are subject to the majority of generally applicable state laws, except when those laws purport to affect their lending operations, in which case the state laws are superseded. Accordingly, the key determination in any case where state law claims challenge the legality of actions taken by federal savings associations against their customers is "which claims fall on the regulatory side of the ledger and which, for want of a better term, fall on the common law side." Ocwen, 491 F.3d at 644.

When OTS promulgated the final version of 12 C.F.R. § 560.2, it explained how to make this decision. It first clarified that the purpose of the final version of section 560.2 is to "provide an interpretive standard for identifying state laws that may be designed to look like traditional property, contract, tort, or commercial laws, but in reality are aimed at other objectives, such as regulating the relationship between lenders and borrowers." 61 Fed. Reg. 50,951, 50,966 (Sept. 30, 1996). OTS's rule-writers made clear that the absence of a particular type of state law in 12 C.F.R. § 560.2(b) "should *not* be deemed to constitute evidence of an intent to permit state laws of that type to apply to federal thrifts." 61 Fed. Reg. at 50,966. Rather, courts must presume that state laws that regulate the relationship between borrowers and lenders are uniformly preempted:

> When analyzing the status of state laws under § 560.2, the first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For these purposes, paragraph (c) is intended to be interpreted narrowly. *Any doubt should be resolved in favor of preemption.*

61 Fed. Reg. at 50,966-67 (emphasis added).

Given this presumption, it is hardly surprising that almost all published court decisions examining fax and other fees charged by a lender in a payoff statement hold that state law claims challenging such fees are preempted.[3] For

[3] Numerous courts, both state and federal, have examined whether a variety of state law claims (based on a variety of fees) are preempted by OTS's regulations. Because no Washington judicial opinion addresses OTS preemption, the value of these decisions, which

example, in Boursiquot, the federal district court for the district of Connecticut found preempted claims alleging the illegality of $90 in "FAX/STATEMENT" fees included in a payoff statement, ruling that the claims "fall squarely within the fields of state law" expressly listed in 12 C.F.R. 560.2(b). Boursiquot, 323 F. Supp. 2d at 352, 355. The Boursiquot court relied upon OTS's own informal interpretation of its preemption regulations to reach its conclusion that the fax and other charges associated with the plaintiffs' payoff statement were "loan-related fees" within the meaning of 12 C.F.R. 560.2(b), and that claims premised upon their illegality were barred by federal law:

> A working example of the types of laws OTS intended to preempt comes from [the Connecticut consumer protection law's] analog, the Unfair Competition Act ("UCA"), Cal. Bus. & Prof. Code §§ 17200 et seq. In an opinion letter OTS stated that UCA is preempted by HOLA where it attempts to regulate loan-related fees *including statement fees and facsimile charges.*

Boursiquot, 323 F. Supp. 2d at 355 n.3 (citing OTS Opinion Letter P-99-3, Mar. 10, 1999, at 16 (emphasis added in Boursiquot)).[4]

Similarly, in Lopez v. World Savings & Loan Association, 105 Cal. App. 4th 729, 130 Cal. Rptr. 2d 42 (2003), the California Court of Appeal rejected

---

conflict in greater or lesser degrees, is limited to their power to persuade. "[W]e are properly guided by the principles of law announced in the most well-reasoned of the decisions we have reviewed. We are not, however, bound to follow a holding of a lower federal court merely because it was announced as such." S.S. v. Alexander, __ Wn. App. __, 177 P.3d 724, 733 (2008).

[4] The McCurrys contend that OTS opinion letters are not entitled to judicial deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). The McCurrys are correct. Rather, "interpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944), but only to the extent that those interpretations have the 'power to persuade.'" Christensen v. Harris County, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000). But it hardly follows from this principle that OTS's view of its own regulation is irrelevant.

precisely the same argument that the McCurrys are making in this case—that "a fee for providing a payoff demand statement is not a loan-related fee," and thus is not preempted. Lopez, 105 Cal. App. 4th at 738-39. The court pointed out, reasonably, that "[p]roviding a payoff demand statement is a service provided by the association as lender in connection with its outstanding loan, and is a necessary step in paying off the loan." Lopez, 105 Cal. App. 4th at 739. Accordingly, the court concluded that fees associated with the plaintiffs' payoff statement were "loan-related fees," and that the plaintiffs' claims were barred by federal law. Lopez, 105 Cal. App. 4th at 737-38. The contrary contention, advanced by both the McCurrys and the plaintiffs in Lopez—that fees associated with something fundamentally necessary to the discharge of the loan (the payoff statement) are somehow not "loan-related"—fairly strains the English language.[5]

Most other cases directly on point are in accord. See, e.g., Haehl, 277 F. Supp. 2d at 941 (reconveyance fee "falls within the broad category of 'loan-related fees'") (citing Chaires v. Chevy Chase Bank, F.S.B., 131 Md. App. 64, 748 A.2d 34 (2000)); Moskowitz v. Wash. Mut. Bank, FA, 329 Ill. App. 3d 144, 148, 768 N.E.2d 262 (2002) (fax and other fees in payoff statement are "loan-related fees" within the meaning of 12 C.F.R. § 560.2(b)(5)).

The Chaires opinion additionally, and correctly, rejects one of the McCurrys' subsidiary arguments—that a choice of law provision in a deed of trust can, by selecting state law, displace a superseding federal regulation. Chaires,

---

[5] The McCurrys have put forward the theory that only fees associated with the *origination* and *maintenance* of loans—rather than their discharge—are "loan-related fees" within the meaning of 12 C.F.R. § 560.2(b)(5). This theory, while plausible-seeming, suffers from the fact that it is utterly unsupported by legal authority.

131 Md. App. at 85 ("appellees did not, as they could not, elect state law over federal law"). This result is hardly surprising; insofar as "OTS . . . occupies the entire field of lending regulation for federal savings associations," 12 C.F.R. § 560.2(a), there is no applicable state law that the McCurrys may elect.

The decisions that the McCurrys rely upon, in contrast, either address different types of fees, and so are irrelevant, are unpersuasive, or have been overturned. First, the vast majority of the McCurrys' authority must be distinguished as dealing with different types of fees or claims. See McKell v. Wash. Mut., Inc., 142 Cal. App. 4th 1457, 1465, 49 Cal. Rptr. 3d 227 (2006) (pass-through fees, which dissent nonetheless convincingly argues are "loan-related"); Gibson v. World Sav. & Loan Ass'n, 103 Cal. App. 4th 1291, 1294, 128 Cal. Rptr. 2d 19 (2002) (unlawful insurance charges); Fenning v. Glenfed, Inc., 40 Cal. App. 4th 1285, 1289-90, 47 Cal. Rptr. 2d 715 (1995) (fraudulent inducement to purchase risky investments; no lending at issue); Pinchot v. Charter One Bank, F.S.B., 99 Ohio St. 3d 390, 398, 792 N.E.2d 1105 (2003) (mortgage satisfaction statute not preempted because not regulating lending activity).

Others of the McCurrys' cited cases are simply unpersuasive.[6] For instance, in Konynenbelt v. Flagstar Bank F.S.B., 242 Mich. App. 21, 29-30, 617

[6] The McCurrys rely heavily on our decision in Dwyer v. J.I. Kislak Mortgage Corp., 103 Wn. App. 542, 13 P.3d 240 (2000), as authority that their CPA claim must be remanded for consideration on the merits. The McCurrys are correct that, in Dwyer, we found the type of fees at issue in this case to be sufficiently deceptive to violate the CPA, holding that they had the "capacity to deceive reasonable consumers into believing that they must pay the fees" before release of the instrument securing a home loan. Dwyer, 103 Wn. App. at 547. But the defendant in Dwyer apparently never raised the issue of federal preemption with respect to the plaintiffs' claims. Nowhere does the opinion mention federal preemption, or perform any analysis of whether the claims at issue might be barred by superseding federal regulations. As such, Dwyer does not resolve the issues properly raised by Chevy Chase in this case.

N.W.2d 706 (2000), the Michigan Court of Appeals reasoned that charges imposed upon reconveyance for the recordation of mortgage could form the basis of valid state law claims simply because the precursor regulation to 12 C.F.R. § 560.2(b), 12 C.F.R. § 545.2, did not explicitly list the type of charges at issue. However, 12 C.F.R. § 560.2 expressly states that the examples listed in subsection (b) are merely illustrative and "without limitation," going so far as to repeat "without limitation" *again* in the subsection listing those fees regulated solely by OTS. 12 C.F.R. § 560.2(b)(5). Further, the Konynenbelt court expressly based its holding upon the rationale advanced in Siegel v. American Savings & Loan Association, 210 Cal. App. 3d 953, 258 Cal. Rptr. 746 (1989), which was (correctly) recognized as abrogated by 12 C.F.R. § 560.2 in Lopez, 105 Cal. App. 4th at 740. See Konynenbelt, 242 Mich. App. at 29.

Similarly, Leto v. World Sav. & Loan Ass'n, No. CIV.A.SA-98-CA0261OG, 1998 WL 1784221 (W.D. Tex. 1998), another opinion cited by the McCurrys, is lacking in persuasive power. Leto is simply an unpublished report and recommendation by a federal magistrate judge, in which the court finds no basis for federal removal jurisdiction because some state law claims might preclude total preemption. Leto, 1998 WL 1784221, at *4.

In sum, every currently valid published judicial opinion—with the exception of Konynenbelt—and OTS itself conclude that fees of the type at issue in this case are "loan-related fees" within the plain meaning of 12 C.F.R. § 560.2(b)(5). As such, "the analysis [ends] there," and any claim alleging the illegality of such fees "is preempted." 61 Fed. Reg. at 50,966. Put more bluntly, our conclusion

that the fax fees and notary fees challenged by the McCurrys are "loan-related fees" means "that is the end of the case." Ocwen, 491 F.3d at 643.

Moreover, even were we to conclude that 12 C.F.R. § 560.2(b)(5) did not conclusively resolve the preemption issue, we would nonetheless conclude, consistent with the rationale stated in Haehl, that a judicial decision imposing restrictions on the type of fees at issue in this case would more than "incidentally affect" the lending operations of federally chartered savings banks and thus nonetheless be preempted pursuant to 12 C.F.R. § 520.2(c):

> A decision in plaintiffs' favor would have the same effect as a direct regulation of the fees: to determine the circumstances under which [the defendant] may charge its customers a reconveyance fee. . . . Thus, applying [state tort] law in this case would more than "incidentally affect" lending operations by imposing substantive requirements on lending operations.

Haehl, 277 F. Supp. 2d at 942. This rationale applies with equal force to the McCurrys' state contract and CPA claims.

Contrary to the McCurrys' contention, there is no basis for distinguishing between the fax fees and notary fees that the McCurrys claim to be unlawful. Both are "loan-related fees" required for the reconveyance and recordation of the deed of trust that was held by Chevy Chase as security for the McCurrys' home loan. This being so, the fees at issue here are directly regulated by OTS, and

state law may not directly or indirectly impose additional requirements on Chevy Chase with respect to them.

Affirmed.

Dwyer, A.C.J.

WE CONCUR:

Ajid, J.

Leach, J.

APPENDIX: B

12 C.F.R. § 560.2 Applicability of law.

(a) Occupation of field. Pursuant to sections 4(a) and 5(a) of the HOLA, 12 U.S.C. 1463(a), 1464(a), OTS is authorized to promulgate regulations that preempt state laws affecting the operations of federal savings associations when deemed appropriate to facilitate the safe and sound operation of federal savings associations, to enable federal savings associations to conduct their operations in accordance with the best practices of thrift institutions in the United States, or to further other purposes of the HOLA. To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities, except to the extent provided in paragraph (c) of this section or Sec. 560.110 of this part. For purposes of this section, ``state law'' includes any state statute, regulation, ruling, order or judicial decision.

(b) Illustrative examples. Except as provided in Sec. 560.110 of this part, the types of state laws preempted by paragraph (a) of this section include, without limitation, state laws purporting to impose requirements regarding:

(1) Licensing, registration, filings, or reports by creditors;

(2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements;

(3) Loan-to-value ratios;

(4) The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

(5) Loan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees;

(6) Escrow accounts, impound accounts, and similar accounts;

(7) Security property, including leaseholds;

(8) Access to and use of credit reports;

(9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants;

(10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;

(11) Disbursements and repayments;

(12) Usury and interest rate ceilings to the extent provided in 12 U.S.C. 1735f-7a and part 590 of this chapter and 12 U.S.C. 1463(g) and Sec. 560.110 of this part; and

(13) Due-on-sale clauses to the extent provided in 12 U.S.C. 1701j-3 and part 591 of this chapter.

(c) State laws that are not preempted. State laws of the following types are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section:

(1) Contract and commercial law;

(2) Real property law;

(3) Homestead laws specified in 12 U.S.C. 1462a(f);

(4) Tort law;

(5) Criminal law; and

(6) Any other law that OTS, upon review, finds:

(i) Furthers a vital state interest; and

(ii) Either has only an incidental effect on lending operations or is not otherwise contrary to the purposes expressed in paragraph (a) of this section.

DECLARATION OF SERVICE

Guy W. Beckett declares:

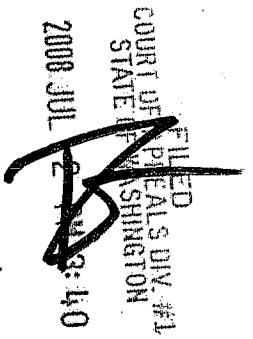
On July 2, 2008, I mailed a copy of the foregoing document by United States first-class mail, with proper postage affixed, to:

Timothy J. Filer
FOSTER PEPPER PLLC
1111 Third Ave., Ste. 3400
Seattle, WA 98101-3299,

and further caused a copy of the foregoing document to be delivered to ABC-Legal Messengers for delivery on July 2, 2008 to said Timothy J. Filer.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED THIS 2nd day of July, 2008, at Seattle, Washington.



Guy W. Beckett